IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANCISCO JAIMES VILLEGAS,	§	
	§	
Plaintiff,	§	
v.	§	3:13-CV-1040-P
	§	
UNITED STATES CUSTOMS AND BORDER PROTECTION OFFICERS GLEN HARRIS and CARL HOFACKER and THE UNITED STATES OF AMERICA,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Defendants' Motion for Summary Judgment, filed on July 3, 2014. Doc. 40. Plaintiff filed his Response on August 1, 2014. Doc. 47. Defendants filed their Reply on August 25, 2014. Doc. 50. After reviewing the parties' briefing, the evidence, and the applicable law, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion.

I. Background

This case arises out of a traffic stop and subsequent arrest. On January 30, 2012, Plaintiff Francisco Jaimes Villegas ("Jaimes") was driving a white pick-up truck on Route 84, also known as Highway 67, in or near Santa Anna, Texas. Doc. 42 at 20, 32-33, 35, 104-06. Defendants Glen Harris ("Harris") and Carl Hofacker ("Hofacker") were driving on the same highway in the opposite direction. Doc. 42 at 32-35. Harris and Hofacker's (collectively, the "Agents") testimony as to what happened next greatly differs from Jaimes's.

According to the Agents, when they first observed the truck Jaimes was driving, they saw five people, but as they passed the truck, Harris saw three people in the backseat duck down. Doc. 42 at 35-36, 40-42, 86. Hofacker did not see anyone in the back but noticed "movement of a

body." Doc. 42 at 86. The Agents also noticed work equipment in the truck's bed. Doc. 33 at 6; Doc. 42 at 37, 107. Harris turned the border patrol truck around to follow Jaimes's truck. Doc. 42 at 44. Harris confirmed that the three people in the backseat were ducked down, and, after driving close enough to Jaimes's truck to read the license plate, initiated a plate check. Doc. 42 at 45-48. Harris noticed that the truck's driver, Jaimes, looked in his rearview mirror at the Agents and that the occupants ducked down in the backseat. Doc. 42 at 49. Jaimes then turned off the main road, and the Agents continued to follow him. Doc. 42 at 49-50. Jaimes made a series of right-hand turns that returned him back to the same location where he was before he turned off the main road. Doc. 42 at 49-51, 87. Jaimes eventually stopped the truck. Finding his previous behavior suspicious, the Agents pulled up behind the stopped truck, turning on their emergency lights. Doc. 42 at 51-53, 77, 87-88.

In contrast, Jaimes maintains that there were only three people in the truck: Jaimes and two Hispanic male co-workers. Doc. 42 at 107; Doc. 47-2 at 5-6. Although Jaimes was driving normally and in accordance with traffic laws, he saw a vehicle, which he believed to be a police vehicle, pull behind him and turn on its emergency lights. Doc. 42 at 109-11; Doc. 47-2 at 6. Jaimes denies that anyone in the truck made any bodily movements out of the ordinary and maintains that he never made any turns off the main road. Doc. 42 at 109; Doc. 47-2 at 10. Jaimes states that he only stopped the truck after seeing the emergency lights, at which point he thought he was being pulled over. Doc. 42 at 109-11; 47-2 at 6, 10.

Once the parties had stopped, the Agents approached the truck, Harris walking to the driver's side and Hofacker walking to the passenger's side. Doc. 42 at 53, 94; Doc. 42-7 at 6. According to Harris, they found in the truck the driver, one person in the passenger seat, and three people ducked down in the backseat. Doc. 42 at 54-55. Jaimes maintains that there were only

three people in the truck. Doc. 42 at 107; Doc. 47-2 at 6-7. The Agents then handcuffed the truck's occupants. Doc. 42 at 61-62; 112-13. While he was standing next to the driver's seat, Harris learned from a radio dispatcher that the truck's license plate was registered in Leander, Texas, which Harris recognized as a town serving as a sanctuary for unlawful aliens. Doc. 42 at 56, 71-73.

According to Harris, he asked Jaimes, in English, how he was doing. Doc. 42 at 58. When Jaimes did not respond, Harris asked the same question in Spanish. Doc. 42 at 58-59. Jaimes, responding in Spanish, said that he was "fine" or something equivalent. Doc. 42 at. 58. Continuing in Spanish, Harris identified himself as an immigration officer and asked the driver to state his citizenship. Doc. 42 at 59, 61. Jaimes stated that he was a citizen of Mexico. Doc. 42 at 61. Harris asked if Jaimes had any documents to be, remain, or work in the United States legally, and Jaimes responded in the negative. Doc. 41 at 61. In an affidavit, Jaimes stated that he does not remember the conversation well, other than that he was handcuffed prior to any discussion with the Agents. Doc. 42 at 21. Jaimes also stated that after being handcuffed, the officer asked if he had papers. *Id.* Jaimes responded that he "answered [the officer's] question." *Id.* Although there had been some confusion as to the actual series of events, Jaimes eventually confirmed this exchange in a later declaration. Doc. 47-2 at 7-8 (referencing Doc. 42 at 113).

When another agent arrived in a vehicle that could hold twelve passengers, the occupants of the truck were moved to the vehicle.[1] Doc. 42 at 21, 61, 63, 70, 112-13. The Agents arranged for a towing company to pick up Jaimes's truck. Doc. 42 at 63-64; 116-17. Later, en route to the

[1] According to Jaimes, this agent was present during the entirety of the stop. Doc. 42 at 112.

Customs and Border Patrol processing office, Jaimes testified that the Agents stopped two more trucks containing Hispanic males and arrested at least two more people. Doc. 47-2 at 8-9.

On March 11, 2013, Jaimes filed suit in federal court. Doc. 1. As amended, Jaimes sues for (1) constitutional violations under the Fourth Amendment against the Agents in their individual capacities pursuant to *Bivens*; and (2) violations of the Federal Torts Claim Act against the United States for false imprisonment and assault. Doc. 33. Defendants now move for summary judgment on all claims. Doc. 41 at 11.

II. Legal Standard & Analysis

a. Motion for Summary Judgment

Under Federal Rule of Civil Procedure 56, courts "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, all evidence and reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,

586-87 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts demonstrating a genuine issue of material fact such that a reasonable jury might return a verdict in his favor. *Liberty Lobby*, 477 U.S. at 247-48. Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *See id.* at 249-50. In other words, conclusory statements, speculation, and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *see also Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 619 (5th Cir. 1993) ("[U]nsubstantiated assertions are not competent summary judgment evidence." (citing *Celotex*, 477 U.S. at 324)). Furthermore, a court has no duty to search the record for evidence of genuine issues. Fed. R. Civ. P. 56(c)(1) & (3); s*ee Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). It is the role of the fact finder, however, to weigh conflicting evidence and make credibility determinations. *Liberty Lobby*, 477 U.S. at 255.

i. Availability of a *Bivens* Remedy

Defendants first argue that Jaimes is not entitled to a *Bivens* remedy. Doc. 41 at 11-14. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), recognized a cause of action against federal officers for the violation of a plaintiff's Fourth Amendment rights. However, the availability of a *Bivens* remedy is "not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances [the Court has] found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In determining whether to recognize a *Bivens* remedy in a new context, courts apply a two-step analysis. *Id.* First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new

and freestanding remedy in damages." *Id.* But, even in the absence of an alternative, "a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.*

A similar case recently decided by the Fifth Circuit addressed a *Bivens* claim related to an arrest by border patrol agents who allegedly lacked reasonable suspicion to make a stop or probable cause for an arrest. *De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015). There, the Court "conclude[d] that there is both an alternative process for protecting the Fourth Amendment rights of illegal aliens subjected to unconstitutional traffic stops and arrests, and special factors require denying a *Bivens* remedy for their claims arising out of civil immigration enforcement proceedings." *De La Paz*, 786 F.3d at 375. In reaching this conclusion, the Court found that the Immigration and Nationality Act (the "INA") comprises an elaborate remedial scheme that precludes creation of a *Bivens* remedy for unlawful seizure claims such as this, and "[t]he special factors unique to the immigration context far outweigh any benefits that might accrue from authorizing *Bivens* suits." *Id.* at 375, 378. Therefore, a *Bivens* remedy was unjustified. *Id.* at 380.

The present case is governed by the Fifth Circuit's holding in *De La Paz*. Before the Fifth Circuit issued the holding, Jaimes even admitted that the appeal "raise[d] the legal issues concerning whether the INA precludes a Bivens remedy under these circumstances." Doc. 47-1 at 27 n.15. Because the Fifth Circuit explicitly held that the INA does preclude a *Bivens* remedy in this context, Jaimes's *Bivens* claims against the individual Agents cannot proceed.

ii. The United States' Liability Under the Federal Tort Claims Act

The Court now turns to Jaimes's claims against the United States for assault and false imprisonment in violation of the Federal Tort Claims Act (the "FTCA"). The FTCA "is a limited

waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *Hernandez v. United States*, 757 F.3d 249, 257 (5th Cir. 2014) (quoting *United States v. Orleans*, 425 U.S. 807, 813 (1976)). Here, Defendants argue that they are entitled to summary judgment because Jaimes has failed to show that the Agents falsely imprisoned or assaulted him. Doc. 41 at 22.

iii. False Imprisonment

"The essential elements of a cause of action for false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law." *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 376 (Tex. 1985). Defendants dispute only the third element because they believe the Agents had authority of law to stop and arrest Jaimes. Doc. 41 at 23-24. Jaimes argues that the Agents did not have authority of law because they lacked the requisite level of suspicion to stop or arrest him. Doc. 47-1 at 47.

A traffic stop is a seizure within the meaning of the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 255 (2007). As such, the seizure must be reasonable, which "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Consequently, a "border patrol agent conducting a roving patrol may make a temporary investigative stop of a vehicle only if the agent is aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle's occupant is engaged in criminal activity." *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001). Specifically in the context of border patrol agents, a number of factors may be considered in determining whether reasonable suspicion exists: (1) proximity to the border; (2) characteristics of

the area; (3) usual traffic patterns; (4) the agent's experience in detecting illegal activity; (5) the behavior of the driver; (6) particular aspects or characteristics of the vehicle; (7) information about recent illegal trafficking in aliens or narcotics in the area; and (8) the number, appearance, and behavior of the passengers. *Id.* No single factor is determinative; rather the totality of the particular circumstances must govern the reasonableness of any stop by roving border patrol officers. *United States v. Moreno-Chaparro*, 180 F.3d 629, 631-32 (5th Cir. 1998). However, "where the agents do not have reason to believe the vehicle has come from the border, the remaining *Brignoni-Ponce* factors must be examined charily." *United States v. Rico-Soto*, 690 F.3d 376, 378 n.1 (5th Cir. 2012) (internal alterations omitted).

Defendants argue that "the characteristics of the area, usual traffic patterns, the agent's experience, the driver's behavior, aspects of characteristics of the vehicle, information about recent illegal trafficking, and the passengers' appearance and behavior all support[] reasonable suspicion." Doc. 41 at 15-16. Specifically, the Agents testified that over the course of their careers they made many stops and arrests on Highway 67 and were therefore aware of illegal trafficking of aliens in the area. Doc. 41 at 16-17; *see also* Doc. 42 at 75-76, 92-93, 97-98. Both Agents have over twenty years as border patrol agents. Doc. 41 at 16; *see also* Doc. 42 at 68, 91. In Harris's experience, illegal aliens are often in work vehicles. Doc. 41 at 17; *see also* Doc. 42 at 37-38. Finally, the Agents maintain that Jaimes's turns through the city streets of Santa Anna and the passengers' ducking behavior supported their reasonable suspicion. Doc. 41 at 17; *see also* Doc. 42 at 35-36, 40-42, 49-51, 83, 87. Considering the totality of the circumstances, the Agents assert that the Agents had reasonable suspicion to stop Jaimes's truck.

Jaimes, however, disagrees with the Agents. Jaimes first argues that passengers ducking down, turning off onto the streets of a city, and looking at law enforcement in a rear view mirror

is not inconsistent with lawful conduct. Doc. 47-1 at 42. Jaimes also maintains that there is nothing inherently suspicious about driving a truck in Texas. Doc. 47-1 at 42. Jaimes then argues that, regardless of whether this is sufficient to establish reasonable suspicion, he disputes every one of the Agents' assertions. Jaimes maintains that there were only three people in the truck, he did not notice the Agents until they turned on their emergency lights, no one in the truck ducked down, and he never left the highway. Doc. 47-1 at 42; *see also* Doc. 42 at 109-10; 47-2 at 5-6, 9-10. Jaimes argues that there was nothing suspicious about his vehicle or his driving; he and his passengers were "simply three Hispanic men in an ordinary work truck traveling to work some two hundred air miles from the border." Doc. 47-1 at 42.

Both parties devote much of their briefing to the credibility of the other party. However, credibility determinations are not proper at the summary judgment stage. The Court does note that there is an exception to this general proposition: though affidavits submitted in opposition to a motion for summary judgment may supplement deposition testimony, they cannot contradict prior testimony without explanation. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 496 (5th Cir. 1996). However, neither party has pointed to subsequent statements that are inconsistent with the parties' testimony of events leading up to the stop. Thus, the majority of events leading up to the stop are contested. Resolving the disputed facts in favor of Jaimes, two veteran border patrol agents, patrolling a highway hundreds of miles from the border known for alien smuggling, saw three Hispanic men in an unfamiliar work truck and decided to stop it, notwithstanding the fact that there was nothing suspicious about the truck's appearance, passengers, or handling.[2]

[2] Though the Agents also assert that they learned that the truck was registered in Leander, Texas, they did not receive this information until the truck was already stopped. *See* Doc. 42 at 56, 71-73.

Considering all these factors together and resolving disputed facts in the nonmovant's favor, the Court finds that Jaimes has sufficiently shown that the Agents acted without reasonable suspicion. Importantly, the Court notes that a "factual condition which is consistent with the smuggling of illegal aliens in a particular area, will not predicate reasonable suspicion, if that factual condition occurs even more frequently among the law abiding public in the area." *United States v. Jones*, 149 F.3d 364, 369 (5th Cir. 1998). Here, the only undisputed factors supporting reasonable suspicion are that Jaimes was driving an unfamiliar work truck, albeit on a stretch of highway commonly used by illegal aliens. Though a road's reputation as a smuggling route contributes to the reasonableness of an agent's suspicion, *see, e.g.*, *United States v. Nichols*, 142 F.3d 857, 867 (5th Cir. 1998), as does an agent's experience, *see, e.g.*, *United States v. Aldaco*, 168 F.3d 148, 150 (5th Cir. 1999), the Agents' failure to recognize the work truck is not sufficient to establish reasonable suspicion, especially where it is unclear whether driving a work truck or having construction equipment in the bed of a truck is uncommon in the area. While the Court recognizes that the Agents rely on a number of other factors that would undoubtedly weigh in favor of reasonable suspicion, a substantial question of material fact exists as to those other factors. As such, the Court cannot determine that the agents had reasonable suspicion to stop Jaimes solely on the basis of the undisputed factors. Therefore, Jaimes has raised a triable question regarding whether the Agents acted without authority of law in stopping Jaimes.

As to Jaimes's arrest, Defendants argue that Jaimes has not shown the arrest was illegal because Jaimes's complaint fails to allege that he informed the Agents of his immigration status. *See* Doc. 41 at 19 n. 12; Doc. 36 at 4-5. However, Jaimes asserts that the Agents handcuffed him immediately after the stop, before asking him any questions. Doc. 33 at 13. Notably, Defendants fail to argue that the handcuffing was not an arrest. *Cf.* Doc. 36 at 4-5; Doc. 38 at 4-5; Doc. 41 at

23 n. 12. Therefore, because the Agents did not ask Jaimes whether he had any "papers" until after they had handcuffed him, Jaimes has adequately alleged that the Agents lacked probable cause at the time of his arrest. Doc. 33 at 14. Therefore, a fact question remains as to whether the Agents acted without authority of law.

iv. Assault

In Texas, a person is liable for assault if he "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Pen. Code § 22.01(a)(3); *see also Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.4 (Tex. 2010) ("the elements of civil and criminal assault under Texas law are the same"). Here, Defendants do not deny that the Agents intentionally contacted Jaimes when they handcuffed him. *See* Doc. 41 at 22-23. Instead, Defendants argue that Jaimes has brought inadequate evidence of damages to his wrists. *Id.* The Court is unconvinced. The Agents should have known that binding someone with handcuffs would be offensive or provocative regardless of the physical harm caused. Therefore, Jaimes's assault claim survives.

III. Conclusion

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment. Specifically, the Court GRANTS Defendants' Motion for Summary Judgment on Jaimes's *Bivens* claims against the individual Agents. The Court DENIES Defendants' Motion for Summary Judgment on Jaimes's FTCA assault and false imprisonment claims against the United States.

IT IS SO ORDERED.

Signed this 30th day of September, 2015.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE